(FEDERAL MARITIME COMMISSION)
(SERVED JUNE 15, 1988)
(EXCEPTIONS DUE 7-7-88)
(REPLIES TO EXCEPTIONS DUE 7-29-88)

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-17

MOBIL OIL CORPORATION

v.

BARBER BLUE SEA LINES

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(1) Where the Complainant avers that a shipment has been misrated by the Respondent in violation of section 10(b)(1) of the Shipping Act, 1984, the parties cannot settle the controversy and the Complainant cannot withdraw its complaint in furtherance of the settlement, where, as here, it has not been established that the complaint presents a genuine dispute and where it cannot be shown that the facts critical to the resolution of the dispute are not reasonably ascertainable. Organic Chemicals (Glidden-Durkee) Corp. v. Atlanttrafik Express Service, 18 SRR 1536(a) (1979).

(2) Where a carrier rates cargo as Hazardous Cargo N.O.S. on the basis of representations made by a shipper and the cargo leaves the custody of the carrier, and where the shipper at an audit made long after the shipment determines that the cargo should have been rated at a lower rate as Paint, Caution, the burden on the shipper to prove its case is a heavy one and here, the shipper-complainant has failed to establish by a preponderance of the evidence that the cargo shipped was Paint.

Christian Alexieff for Complainant Mobil Oil Corp.
Jeffrey F. Lawrence and Kelly A. Knight for Respondent Barber Blue Sea Line.

INITIAL DECISION[1] OF JOSEPH N. INGOLIA,
ADMINISTRATIVE LAW JUDGE

Preliminary Matters

This proceeding began with a complaint filed by Mobil Oil Corporation ("Mobil") alleging that Barber Blue Sea Line ("BBS") had violated section 10(b)(1) of the Shipping Act, 1984 (46 U.S.C. app. § 1709(b)(1)), by collecting freight charges in excess of those provided in its tariff, on a shipment described in the bill of lading as "asphalt cutbacks." Mobil claimed it had been damaged and asked for reparations of $12,446.22, with interest and costs.

On February 26, 1987, Mobil filed a motion to withdraw its complaint together with a settlement agreement whereby BBS agreed to pay Mobil $9,500.00 as full settlement. The Administrative Law Judge ("ALJ") granted the motion to withdraw the complaint and dismissed the proceeding, with prejudice. The Commission then remanded the proceeding noted that, "in claims alleging freight overcharges, the Commission requires that the settlement be scrutinized in order to ensure that the agreement between the parties does not result in an unlawful rebate or refund." It stated further:

> * * * Therefore, parties which propose to settle a claim alleging freight overcharges in violation of the carrier's tariff must:

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[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

(1) submit to the Commission a signed settlement agreement;

(2) file with the settlement agreement, an affidavit setting forth the reasons for the settlement and attesting that the settlement is a bona fide attempt by the parties to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act;

(3) show that the complaint on its face presents a genuine dispute and the facts critical to the resolution of the dispute are not reasonably ascertainable. Organic Chemicals (Glidden-Durkee) Corp. v. Atlanttrafik Express Service, 18 S.R.R. 1536a, 1539-40 (1979).

After the initial remand the parties resubmitted the settlement agreement together with a joint affidavit affirming that the settlement agreement was an attempt to settle a genuine dispute and stating that "facts and information critical to the resolution of the dispute are not reasonably ascertainable without further lengthy and costly litigation." The parties also submitted a memorandum in support of the settlement as well as letters explaining the background to the proposed settlement. On November 23, 1987, the ALJ approved the settlement noting the holdings in Clark International Marketing S.A., a Division of Clark Equipment Company v. Venezuelan Line, 22 SRR 464 (1983), and Organic Chemicals (Glidden-Durkee) Corp. v. Atlanttrafik Express Service, 18 SRR 1536(a) (1979), and finding that:

> * * * the settlement here reflects a reasonable interpretation of the carrier's tariff in that it is a bona fide attempt to terminate their controversy, and not a device to obtain transportation at other than the applicable rates or otherwise circumvent the requirements of the Shipping Act. Further, the complaint sets forth a genuine dispute and all the facts critical to its resolution are not reasonably obtainable.

On April 12, 1988, the Commission again remanded the case to the ALJ, vacating his approval of the settlement and motion for dismissal of the complaint. In so doing the Order of Remand states:

> The Presiding Officer's approval of the settlement does not explain the basis for this determination that the Glidden-Durkee standards have been met. Mobile, in fact,is not denying that it shipped asphalt cutbacks. it merely argues that the product should have been more reasonably classified as "Paint (Caution)" and not as "Dangerous or Hazardous Cargo N.O.S." which provided a higher rate. Both parties agree that BBS classified the shipment in accordance with the reference to the IMCO classification set forth in the bill of lading.
>
> The controversy here therefore appears to be not over what was shipped but over how the shipment should be classified. Hence, contrary to the parties' arguments, the resolution of the dispute is not contingent on controverted facts and the difficulty in obtaining additional evidence, as was the case in Glidden-Durkee. The issue rather turns on the appropriate tariff item to be applied to the commodity shipped - a straightforward matter of tariff construction. Although the parties cite the projected high cost of litigation in relation to the amount sought to be recovered as further support of their proposed settlement, that cost standing alone would not bring the dispute within the purview of the Glidden-Durkee exception so as to allow them to settle their dispute on terms other than provided in the carrier's tariff.

By Procedural Order dated April 20, 1988, the parties were invited to make any further submissions they deemed appropriate in light of the latest Order of Remand. BBS stated that while it "is frankly puzzled over the narrow view taken by the Commission of the matters at issue in this case" it was not making further legal argument and alleged that Mobil had failed to meet its burden of proof. Mobil offered no material additional evidence.

Facts

1. The Complainant, Mobil, is a corporation which is actively engaged in businesses related to the oil industry. (Complaint)

2. The Respondent, BBS, is a common carrier by water engaged in transportation between the United States and Singapore. It is subject to the Shipping Act, 1984. (Complaint)

3. On October 23, 1984, Mobil shipped certain cargo aboard BBS's vessel, the Barber Nara. The bill of lading contains the following Description of Goods:

> 5 (FIVE) WOOD CASES: ASPHALT CUT BACKS
> IMCO CLASS 3.3
> UN #1999
> IMCO PAGE #3126 FLASHPOINT 104°
>
> ALL MATERIALS INCLUDED IN THIS BILL OF LADING ARE OF A WHOLLY PROPRIETARY NATURE NOT FOR RESALE AND ARE FOR THE USE IN THE PRODUCTIONS AND REFINING OF OIL IN THE STATE OF SUMATRA
>
> C.C.C. N. #32.09.219

(Exhibit A, attached to the Complaint; Dock Receipt attached to ~~Mobile~~ BBS's letter of April 29, 1988)

4. The International Maritime Dangerous Goods ("IMDG") Code, page 3126, lists Cut-Backs, asphalt or bitumen, UN No. 1999, as an hazardous material. (Copy of page 3126, attached to ~~Mobil's~~ BBS's letter of April 29, 1988)

5. The IMDG Code, page 3149, classifies "Paints" under UN No. 1263 as an hazardous material. (Copy of page 3149, attached to ~~Mobil's~~ BBS's letter of April 29, 1988)

6. BBS rated the shipment referred to in paragraph (3), above, as Dangerous or Hazardous Cargo N.O.S. at $523.00, plus other applicable charges. The total freight charge was $15,624.58, and was prepaid. (Atlantic and Gulf-Singapore, Malaya and Thailand Conference, Freight Tariff No. 16, FMC No. 6, 14th rev. p. 143, Item No. 695, attached to Complaint)

7. The tariff referred to in paragraph (6), above, also contained a rate for "Paint, Paint Thinners and Varnish" on the date of shipment of $215.00 to Singapore. Had the shipment involved here been rated as "Paint," the freight charges would have been $3,178.36. (Atlantic and Gulf-Singapore, Malaya and Thailand Conference, Freight Tariff No. 16, FMC No. 6, 8th rev. p. 185-A, attached to Complaint)

8. On or about January 28, 1985, Mobil, through its agent, Ocean Freight Consultants, Inc., asked BBS to refund to it $12,446.62 on the basis that the rate for "Paint, Caution," should have been used rather than the Hazardous NOS rate (OFC Claim No. C 12721, attached to the Complaint).

9. BBS denied Mobil's claim for refund stating:

> Inasmuch as the AGSMT tariff, in effect at the time, had no rate for hazardous asphalt, the rate for hazardous cargo NOS as applied remains valid.

(BBS letter dated May 9, 1985, attached to Complaint)

10. In response Mobile stated in part:

> On the first hand we must be able to agree that administrative errors occur from time to time in the transportation industry and that we being in the service field have to cater to our clients' needs. In response to your letter, in the second paragraph you

state that "as far as we can determine, this cargo is anything other than asphalt cut-backs", when the facts of this matter lies in my sending your company, at three (3) different instances, a letter from the manufacturer confirming the tragedy of this misclassification and confirming the correct description to be used to the Singapore area. In addition I sent you the actual sales/marketing brochures describing these goods and describing their uses. For your information, Asphalt cutback is used as a road surfacing compound exclusively. (Incidently this information is in the Chemical dictionary) In as much that you may not have considered all this, I sure you must realize that a shipper is ultimately responsible to classify the goods he ships, and is bound by FMC regulations to do this properly.

Ultimate Finding of Fact

11. The Respondent properly rated the cargo as Hazardous Cargo N.O.S., as initially represented by the Complainant and the Complainant's later assertion that the cargo should have been rated as Paint, Caution, was not supported by a preponderance of the evidence of record.

Discussion and Conclusions

In essence the basic initial issue presented in this case is not a complex one. As the facts indicate, Mobil shipped cargo with BBS that Mobil designated as Asphalt Cut Backs. At the time of shipment Mobil made no mention or allegation that Paint was being shipped and BBS quite properly rated the shipment as Dangerous or Hazardous Cargo N.O.S. at a rate of $523.00, on the basis of the information given it. Sometime later after the shipment was made, Mobil discovered that, in its view, the shipment made was Paint. Again, quite properly, it asked BBS to

re-rate the shipment as Paint and refund the difference in freight charges. When BBS refused to do so, Mobil brought this action. In so doing Mobil has presented evidence that the cargo shipped was Paint. (See the documents attached to the Complaint which included a letter from the product manufacturer.) As the proceeding progressed, the parties reached agreement and submitted their settlement proposals which have previously been noted.

At this juncture the issue in the case changed from "what was the correct rate under the tariff?" to "can the parties settle this proceeding with the parameters set forth in Glidden-Durkee, supra?" As the Commission notes at page 3 of the first Order of Remand (June 17, 1987) settlement of a claim alleging freight overcharges in violation of the carrier's tariff must (1) be accompanied by a signed settlement agreement which has been done in this case, (2) together with the settlement agreement, contain an affidavit attesting to the bona-fides of the settlement, which also was done in this proceeding, and (3) must show that the complaint presents a genuine dispute, and the facts critical to the resolution of the dispute are not reasonably ascertainable. From the record made in this case, points (1) and (2) above have been satisfied. If we understand the most recent Order of Remand, it is point (3) that causes concern.

Given the language of the Commission's latest Order of Remand, there is no need to elaborate on the undersigned's prior finding approving the settlement agreement, except to say that it

was his view the third requirement of Glidden-Durkee had been satisfied. The Commission obviously feels otherwise stating that, "Mobil, in fact, is not denying that it shipped asphalt cutbacks" and that "The controversy here therefore appears to be not over what was shipped but over how the shipment should be classified. Hence, contrary to the parties' arguments, the resolution of the dispute is not contingent on controverted facts and the difficulty of obtaining additional evidence, as was the case in Glidden-Durkee."

However much the undersigned may disagree with the above he is bound by the determination that has been made. That being so he has discarded the settlement agreement and has considered the case on its merits based on the facts in the record. As has already been noted, those facts indicate that BBS acted properly when it rated the cargo as Hazardous Cargo N.O.S., rather than Paint, Caution. While there are other facts of record indicating the cargo could have been rated as Paint, Caution, those facts are not of such weight as to warrant a decision in favor of the Complainant. In reparations proceedings such as this, the claimant has the burden of establishing by a preponderance of the evidence that the respondent exacted charges for transportation in excess of those lawfully applicable. Madeplac S.A. Industria de Madeiras v. L. Figueriedo Navegacao S.A. a/k/a Frota Amazonica S.A., affirmed 21 F.M.C. 214 (1978). Indeed, where the nature of the cargo is in question, as here, and the cargo has left the custody of the carrier before the claim is brought and the cargo cannot be reexamined, as here, a heavy burden of proof is imposed

on the complainant. Kraft Foods v. Moore McCormack Lines, 19 F.M.C. 407, 410 (1976). It is held that in this proceeding the Complainant has not established that the Respondent has violated section 10(b)(1). Therefore, the relief sought in the Complaint is hereby denied and the proceeding is hereby discontinued. The Complainant has received $9,500.00 in this proceeding in anticipation of the approval of the settlement. Failing such settlement approval, Mobil is directed to return the money to the Respondent within thirty (30) days of the final action taken by the Commission.

Finally, by way of clarification and in the spirit of cooperation, some further comment is warranted. This proceeding has been decided on whether or not the requirements of Glidden-Durkee have been satisfied. The undersigned respectfully notes that in his view the first two requirements adequately safeguard against any discriminatory practices. The third is too vague and too remote to give any desirable, pragmatic result. Here, for example, there is no question of rebate or discriminatory rating practice. Not only that, the parties were perfectly willing to settle the rather straightforward issue of how the cargo should be rated. In many cases, to separate the issue of how the cargo should be rated from the issue of what was shipped is unrealistic and inaccurate, since before determining how you have to know what. If the third requirement of Glidden-Durkee is to be so interpreted to prevent a settlement, the result, in effect, is to revert to the rule that a section 10(b)(1) case (formerly

18(b)(3) under the Shipping Act, 1916) cannot be settled until a violation is found--a rule that Glidden-Durkee itself rejected.

Joseph N. Ingolia
Administrative Law Judge

Washington, D.C.
June 14, 1988

(S E R V E D)
(JUNE 17, 1988)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

June 17, 1988

DOCKET NO. 86-17

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ERRATA

On page 5 of the Initial Decision served June 15, 1988, in paragraphs 3, 4 and 5, the reference to "Mobil's letter of April 29, 1988," should be to "BBS's letter of April 29, 1988."

Joseph N. Ingolia
Administrative Law Judge

(S E R V E D)
(October 14, 1988)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-17

MOBIL OIL CORPORATION

v.

BARBER BLUE SEA LINE

ORDER OF PARTIAL ADOPTION OF INITIAL DECISION

The Initial Decision ("I.D.") of Administrative Law Judge Joseph N. Ingolia ("Presiding Officer" or "ALJ") issued in this proceeding is before the Commission on Exceptions from Complainant Mobil Oil Corporation ("Mobil" or "Complainant").

BACKGROUND

The proceeding was instituted by complaint filed by Mobil, alleging that Barber Blue Sea Line ("BBS" or "Respondent"), an ocean carrier subject to regulation under the Shipping Act of 1984 ("1984 Act" or "Act"), 46 U.S.C. § 1701, et seq., violated section 10(b)(1) of the Act by collecting freight charges in excess of those provided in the applicable tariff on a shipment described in the bill of lading as "asphalt cutbacks." BBS applied the "Dangerous or Hazardous Cargo N.O.S." classification to the shipment.

Mobil maintains that the cargo should have been classified as "Paints (Caution)" for which the tariff provided a lower rate.[1]

Before a hearing was held the parties submitted to the ALJ for approval a settlement agreement whereby BBS agreed to refund to Mobil $9500 of the alleged $12,500 overcharge. On March 12, 1987, the Presiding Officer approved the settlement on the ground that "the Congress, the courts and administrative agencies generally favor the settlement of disputes."[2]

On review, the Commission in an Order of Remand issued June 17, 1987, vacated the ALJ's March 12 ruling and remanded the proceeding for a determination of whether the settlement met the standards set forth in Organic Chemicals (Glidden-Durkee) Corp. v. Atlanttrafik Express Service,

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[1] See Atlantic and Gulf-Singapore, Malaya and Thailand Conference, Freight Tariff No. 16, FMC No. 16, 8th Rev. p. 185-A, effective 10/9/84.

[2] Complainant's Motion to Withdraw Complaint Granted, With Prejudice, served March 12, 1987.

18 S.R.R. 1536a (1979) ("Glidden-Durkee").[3] Subsequently, after receipt of additional documents, the Presiding Officer, on November 23, 1987, held that the requirements of Glidden-Durkee were met, that the facts critical to the resolution of the dispute were not reasonably obtainable and again approved the proposed settlement.[4]

Thereafter, the Commission, in a second Order of Remand, vacated the Presiding Officer's November 23 ruling and again remanded the proceeding for a decision on the merits.[5] The Commission's order noted that Mobil was not denying that it shipped "asphalt cutbacks" but merely argued for a different classification of the product. As a consequence, the Commission concluded that resolution of the dispute turned on the interpretation of the carrier's tariff

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[3] Under Glidden-Durkee, parties which propose to settle a dispute involving tariff rates and charges must:

> (1) submit to the Commission a signed settlement agreement;
>
> (2) file with the settlement agreement, an affidavit setting forth the reasons for the settlement and attesting that the settlement is a bona fide attempt by the parties to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act;
>
> (3) show that the complaint on its face presents a genuine dispute and the facts critical to the resolution of the dispute are not reasonably ascertainable.

[4] Agreement of Settlement and Motion for Dismissal of Complaint Approved, 24 S.R.R. 633, 634 (1987).

[5] Order of Remand, 24 S.R.R. 915 (1988).

and not on the unavailability of additional evidence as contemplated in Glidden-Durkee.

Subsequently, on June 15, 1988 the Presiding Officer issued an I.D. in which he held that Mobil has failed to prove by a preponderance of the evidence that the product shipped should have been rated as "Paints (Caution)." Accordingly, he denied reparations and dismissed the complaint.

The Presiding Officer found that while the first two requirements of Glidden-Durkee were met, the third requirement was "too vague and remote to give any desirable, pragmatic result." He added, however, that in light of the parties' willingness to settle the rather "straightforward" issue of how the cargo should be rated, the Commission's refusal to allow the parties to settle, amounted, in his opinion, to a reversal of the Glidden-Durkee decision.

DISCUSSION

The only issue in this proceeding is the proper classification of the shipment BBS carried for Mobil from New York to Singapore.

Because the carrier must collect freight charges for the transportation service performed, the Commission has recognized that notwithstanding the description of the cargo in the bill of lading, freight may be assessed only on "what

actually moved."[6] The burden of proving by a preponderance of the evidence what actually moved falls on the shipper who challenges any description.

Mobil excepts to the Presiding Officer's ultimate finding that it had failed to prove by a preponderance of the evidence that the shipment should have been rated as "Paints (Caution)." Mobil refers to the letter of David Evans of RPM Industries ("RPM"), the manufacturer of the products shipped, as evidence that the shipment can accurately be described as protective paints and coatings. Such evidence, in Mobil's opinion, satisfies the burden of proof imposed on the Complainant. Mobil wants the record to reflect that the goods shipped were not "asphalt cutbacks" but protective paints and coatings for use on its metal warehouses in Singapore.

The bill of lading, as mentioned, describes the shipment as "asphalt cutbacks," and sets forth the International Maritime Dangerous Goods Code ("IMDG") classification number,

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[6] Western Publishing Co. v. Hapag-Lloyd A.G., 13 S.R.R. 16 (1972).

and flash point.[7] RPM's packing list, which sets forth the flashpoint and inflammable liquid label requirement for the products shipped, contains the following statement signed by its Export Sales Manager, David M. Evans:

> Flash Point 104 F. Inflammable Liquid Label.
>
> I hereby certify that the the contents of this shipment are properly classified, described, packaged, marked and labeled and that they are in proper condition for transportation according to the applicable regulations of the Department of Transportation. I acknowledge that I may be liable for damages resulting from and [sic] mis-statement and/or omission and I further agree that all parties and carriers involved in the shipment of this consignment may rely upon this certification.[8]

In addition, RPM's catalogue attached to the complaint, entitled "Systems Guide for Metal Building Restoration," shows that all the products shipped, with the exception of a roll of "Alumaglass," have a liquid asphalt base.[9]

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[7] "Flash point" is defined as:

> . . . the minimum temperature at which a liquid gives off vapor within a test vessel in sufficient concentration to form an ignitable mixture with air near the surface of the liquid . . . .

Department of Transportation ("DOT") regulations, 49 C.F.R. Subtitle B, Chapter I -- Research and Special Programs Administration. Subchapter C -- Hazardous Materials Regulations, Part 171, Section 171.8 -- Definitions and abbreviations.

[8] Section 172.101 lists "asphalt cutbacks" in the Hazardous Materials Table. See also IMDG Code, Vol. II p. 3126 for "asphalt cutbacks" and p. 3149 for "Paints" with the same flashpoints and red label requirement.

[9] "Asphalt base" in Perma-Primer and Perma-Plastic, and "asphaltic liquids" in Alumanation.

Against this background Mobil in essence argues that because the products were to be used as protective coatings, sprayed or applied by brush, they should have been described as asphalt paints and rated as "Paints (Caution)."[10]

Respondent's tariff did not provide a specific commodity rate for "asphalt cutbacks" but under the heading "Dangerous or Hazardous Cargo N.O.S." listed "Inflammable Liquids (Red Label)" which is more specific than "Paints (Caution)." In light of the manufacturer's acknowledgement that the products were inflammable liquids with a 104 F. flashpoint requiring a red label, it would appear irrelevant for tariff purposes whether they were described as "asphalt cutbacks" or "asphalt based paints" or simply "paints." BBS therefore properly classified and rated the shipment.[11]

Complainant further maintains on exception that it has been "subjected to a disadvantageous export commercial practice by BBS and the FMC" in that any other shipper who called the same product "paint" would have been charged the lower rate. Mobil's Exceptions, p. 4. It attributes the alleged misdescription of the shipment to the ineptness of

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[10] Mobil cites Crestline Supply Corp. v. Concordia Line, 19 F.M.C. 207, 211 (1976); The Carborundum Co. v. Royal Netherlands S.S. Co., 19 F.M.C. 431, 433 (1977); and C.S.C. International v. Lykes Bros. S.S. Co., Inc., 20 F.M.C. 552 (1978), all of which hold that the intrinsic nature of the product rather than the intended use is the relevant tariff classification factor.

[11] DOT's regulations distinguish between inflammable and combustible liquids. The latter are described as comparatively difficult to ignite and as burning slowly.

its freight forwarder and of its export department. Complainant's point is not well taken. Section 10(a)(1) of the 1984 Act prohibits any person knowingly and wilfully by false classification to attempt to obtain transportation at less than the applicable charges, 46 U.S.C. app. § 1709(a)(1). Therefore, misclassifying cargo is not a legal option.

Furthermore, in the event the Commission does not approve the settlement and intends to adopt the I.D., Mobil requests a full evidentiary hearing and the opportunity to present expert witnesses as to the true nature of the goods shipped and their subsequent use and asks that BBS be ordered to pay injuries of $12,446.22 plus interest and legal costs. The request, however, is untimely. By Procedural Order served April 20, 1988, the Presiding Officer directed the parties to file "any further submission including motions, factual evidence and briefs, no later than April 29, 1988" after which date the record would be closed and a decision on the merits issued. Thus, Mobil had full and fair opportunity to request an evidentiary hearing and submit the evidence it now proposes to offer. Whereas BBS submitted some additional documents, Mobil did not respond to the Procedural Order. Consequently, its failure to do so must be viewed as a waiver of its right to an evidentiary hearing. Neither does the unspecific offer to bring in some expert witnesses warrant a reopening of the

record.[12]

Further, there is the matter of BBS' refund to Mobil of $9500 of the freight charges collected before the ALJ's order approving the settlement and dismissing the proceeding became effective.[13] The ALJ directed Mobil to return the $9500 to BBS. However, because the carrier has the obligation to charge and collect freight charges in accordance with its tariff,[14] BBS will also be ordered to take the necessary steps to collect this money from Mobil should Mobil fail to return the $9500 within 30 days from the service of this Order.[15]

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[12] See Rule 230(a) of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.230(a) (1987). It should be noted that when it submitted the settlement for approval, Mobil argued that the facts critical to the resolution of the dispute were not reasonably ascertainable. See Joint Affidavit of the parties, received November 3, 1987.

[13] We reject Mobil's argument that by its willingness to settle and its refund of $9500, BBS has more or less admitted misrating the shipment. BBS in fact denies that it has in any way admitted misrating the shipment and insists that in view of the relatively small amount involved, the underlying reason for the settlement was the projected cost and risk of litigation. However, a carrier engaged in transportation subject to regulation under the 1984 Act does not have discretion as to whether or not to enforce its tariff. See Order of Remand, supra, n. 5, Banfi Products Corp., 24 S.R.R. 948, 949 (1988).

[14] See Section 10(b)(1) of the 1984 Act.

[15] The necessary steps may include suing Mobil to recover the $9500 refund. Louisville & Nashville R. Co. v. Mead Johnson & Co., 737 F.2d 683, 686 (7th Cir. 1984); Inman Freight Systems, Inc. v. Olin Corp., 614 F.Supp. 1355 (D.C. Mo. 1985).

Finally, although the Commission finds that the ALJ properly denied reparation based on the finding that Mobil had not sustained its burden of proving that BBS misrated the cargo, it disagrees with the ALJ's conclusion that by its earlier actions taken in this proceeding the Commission was in effect reversing Glidden-Durkee. In Glidden-Durkee the issue went to the precise measurements of discarded drums, whereas the question in this proceeding is the proper description and classification of the product. In this instance, it should have been possible to establish the true nature of the shipment if different from that appearing in the bill of lading. Consequently, the Commission's disapproval of the proposed settlement and the subsequent remand was not, as implied by the Presiding Officer, a reversal of the Glidden-Durkee decision.

THEREFORE, IT IS ORDERED, That the Exceptions of Mobil Oil Corporation are denied;

IT IS FURTHER ORDERED, That the Initial Decision of Administrative Law Judge Joseph N. Ingolia is adopted by the Commission except to the extent indicated above;

IT IS FURTHER ORDERED, That Barber Blue Sea Line shall collect from Mobil Oil Corporation and Mobil Oil Corporation shall remit to Barber Blue Sea Line freight charges in the amount of $9500; and

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

Joseph C. Polking
Secretary